

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION TO CHANGE WATER RIGHT NO. 40F 30155836 BY DAN L. GEER)))	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On May 31, 2022, Dan L. Geer (Applicant) submitted Application to Change Water Right No. 40F 30155836 to change Statement of Claim No. 40F 158372-00 to the Havre Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated July 26, 2022. The Applicant responded with information dated October 6, 2022. The Application was deemed correct and complete as of December 1, 2022. An Environmental Assessment for this Application was completed on March 14, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change Water Right, Form 606-IR
- Maps: Department of Natural Resources and Conversation Examination Report showing point of diversion - old and new location

Information Received after Application Filed

- Deficiency Letter response from Applicant to DNRC dated October 6, 2022

Information within the Department's Possession/Knowledge

- Department file for Statement of Claim No. 40F 158372-00
- Water right records for surrounding area
- Department's Technical Report dated December 1, 2022
 - The Department also routinely considers the following information. The following information is not included in the administrative file for this

Application but is available upon request. Please contact the Havre Regional Office at 406-265-5516 to request copies of the following documents:

- Department Efficiency Policy memo (Policy Memo – change in method of irrigation) dated December 2, 2015

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Statement of Claim (Claim) No. 40F 158372-00 for 2.5 CFS flow rate from Arnoux Creek for the purpose of flood irrigation with a priority date of September 30, 1949. The period of diversion and period of use are May 1 – August 15. The place of use is 120.0 acres in the W2SENW, SWNW, W2SWSE, and SW of Section 34 Township (T)35N Range (R)12W Glacier County. The point of diversion is a headgate in the NWNENW Section 10, T34N, R12W Glacier County. Claim 40F 158372-00 is not supplemental with any other water rights. Table 2 shows the elements of the water right proposed for change.

Table 1: WATER RIGHT PROPOSED FOR CHANGE

W.R. NO.	FLOW	VOLUME	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
40F 158372-00	2.50 CFS	Not to exceed the amount put to historical and beneficial use	Irrigation (120 acres)	May 1 – August 15	W2SENW (1.93 Acres), SWNW (16.65 Acres), W2SWSE (3.68 Acres), SW (97.74 Acres) Section 34 T35N R12W Glacier County	NWNENW Section 10, T34N R12W Glacier County	September 30, 1949

4. The Applicant proposes to 1) retire the point of diversion (POD) located at NWNENW Section 10 T34N R12W Glacier County, 2) add a point of diversion 2.34 miles upstream of the original POD through means of a pump located in the SWNWNW Section 34 T35N R12W Glacier County.
5. This proposed change would move the point of diversion off Blackfeet Indian Reservation tribal land and onto the Applicant's property.
6. The place of use, period of diversion, period of use, and purpose are not proposed for change.

CHANGE CRITERIA

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use

or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

9. The Applicant chose to use the Department's standard consumptive use methodology, per ARM 36.12.1902(16). Claim 40F 158372-00 has a decreed flow rate of 2.50 CFS for irrigation from Arnoux Creek at a point of diversion located in the NWNENW Section 10, T34N R12W, Glacier County. The Applicant historically grew grass and alfalfa hay. The historic period of diversion is May 1 – August 15. The Department finds the maximum historical irrigation use of Statement of Claim 40F 158372-00 is 120.0 acres which is the amount the Montana Water Court affirmed in the issuance of preliminary decree for Cut Bank Creek, Basin 41L.

10. The Applicant chose to use the Department's standard methodology for calculating historic consumptive volume, per ARM 36.12.1902(16). The evapotranspiration inches for flood irrigation using the St. Mary's weather station was 13.64 inches. This figure multiplied by the 62.2% historical management factor for flood irrigation in Glacier County results in 8.48 inches per irrigated acre. The historic consumptive volume for 120 acres is therefore 1,017.6 inches (8.48 inches x 120 acres), or 84.8 AF (1,017.6 / 12 inches per foot). The on-farm efficiency for the contour ditch flood irrigation system is 60%. The 84.8 AF historic crop consumptive volume is

divided by 0.60 to arrive at the field applied volume of 141.3 AF. Irrecoverable losses for flood irrigation are assumed to be 5% of the field application volume, of 7.1 AF. The total historic consumptive use volume is 91.9 AF (84.8 + 7.1). The historical use was flood irrigation by using a ditch as a mean of conveyance according to the statement of claim for water right 40F 158372-00 which is how the Department concluded 60% for on-farm efficiency. The calculation total for historic consumptive volume is 91.9 AF.

11. To find the historic diverted volume the Department used three feet is used for the ditch wetted perimeter instead of the 10 feet that was indicated in the application (three feet wide on bottom, four feet wide on top, and two feet deep). The soil type used is loam. The flow rate of 2.50 CFS would not be feasible at 10 feet for ditch wetted perimeter. It can be inferred that the ditch was not fully utilized at the dimensions described in the original application, thus three feet is a more accurate conclusion for a flow rate of 2.50 CFS. The days irrigated between May 1st and August 15th is 107 days. The ditch length was physically measured on a map and came to be one mile or 5,280 ft.

Table 2: Historic Consumptive Volume (AF) Equation for Claim 40F 158372-00

Historic Consumptive Volume (HCV) Flood Sprinkler	Flood or Flood/Sprinkler ET (Inches)	Management Factor (Percent)	Historic Acres (acres)	HCV AF (minus IL)	On-farm Efficiency	Field Application AF	Historic Irrecoverable Losses (IL) Flood 5%:	HCV AF (Including IL)
	13.64	62.2%	120	84.8	60%	141.4	7.1	91.9

Table 3: Historic Diverted Volume (AF) Equation 40F for Claim 158372-00

HCV AF (minus IL)	On-farm Efficiency	Seasonal Conveyance Loss Volume (seepage loss + vegetation loss + ditch evaporation)	Total HDV AF
84.8	60%	160.6	313.7

Table 4: Seepage Loss for Claim 40F 158372-00

<i>Seepage Loss:</i>	Ditch Wetted Perimeter (Feet)	Ditch Length (Feet)	Ditch Loss Rate (ft3/ft2/day)	Days Irrigated	Seepage Loss (/43560)
	5	6336	2	107	155.6

Table 5: Vegetation Loss Equation for Claim 40F 158372-00

<i>Vegetation Loss:</i>	% loss/mile	Historic Flow Rate (HFR) (CFS)=	Days Irrigated	ditch length (miles)	Vegetation Loss (*2)
	0.0075	2.5	107	1.2	4.8

Table 6: Ditch Evaporation for Claim 40F 158372-00

Ditch Width (Feet)	Ditch Length (Feet)	Evaporation (Potts)	Ditch Evaporation (/43560)
3	6336	0.2475	0.1

12. The Department found a historic consumptive use of 91.9 AF and a historic diverted volume of 313.7 AF. The 120 acres was confirmed in 1969 WRS historic aerial imagery.

13. The Department finds the following historic use:

Table 7: Historical Use for Water Right 40F 158372-00

WR Claim #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
40F 158372-00	September 30, 1949	313.7 AF	2.50 CFS	Irrigation 120.0 acres	91.9 AF	W2SENW (1.93 Acres), SWNW (16.65 Acres), W2SWSE (3.68 Acres), SW (97.74 Acres) Section 34 T35N R12W Glacier County	NWNENW Section 10, T34N R12W Glacier County

FINDINGS OF FACT – Adverse Effect

14. The Applicant is proposing to move their point of diversion, and their method of irrigation will also be updated from flood irrigation to sprinkler (handline). The current point of diversion is a headgate located at NWNENW Section 10, T34N R12W Glacier County. The proposed point of diversion consists of a pump located in the in the SWNWNW Section 34, T35N R12W Glacier County.

15. Per the Department's Efficiency Policy Memo, dated 12/2/2015, even though the method of irrigation is changing from flood irrigation to sprinkler irrigation, the historic consumptive use and proposed consumptive use are assumed to be equal because the irrigation place of use is not changing. The Department's Efficiency Policy Memo dated 12/2/2015 states: "If a water right appropriator is only changing their point of diversion and is not increasing the number of acres historically irrigated or changing the place of use, then the Department will assume for purposes of the comparison of the historic use to the new use that there is no change in consumption or return flow resulting from a post 1973 change in method. This applies only to the place of use and number of acres historically irrigated. If the change finds that new or expanded acres have or will be irrigated, then §85-2-402, MCA does apply to those acres."

16. The Department found that the historical diverted volume for Claim 158372-00 to be 313.7 AF. Under the changed use presented in this Application, the proposed diverted volume will be limited to 91.9 AF through the change in the method of irrigation from flood to sprinkler handline irrigation within their historic place of use.

17. This proposed change would move the current point of diversion off Blackfeet Indian Reservation tribal land and onto the Applicant's (Geer) land. This change would put the Applicant into compliance with their land ownership. The proposed Point of Diversion is moving around two miles north of the original Point of Diversion. More water is available to downstream water rights and there won't be adverse effect to those intervening water users. There is also more water being left instream because the proposed diverted volume is less than historic due to lack of conveyance losses. The Department finds there will be no adverse effect to water users because of this change of point of diversion.

BENEFICIAL USE

FINDINGS OF FACT

18. Applicant (Geer) proposes to use water to irrigate 120.0 acres under a sprinkler handline. Irrigation is identified as a beneficial use of water pursuant to §85-2-102(5)(a), MCA.

19. Applicant proposes to use 2.50 CFS flow rate up to 91.9 AF of diverted volume.

ADEQUATE DIVERSION

FINDINGS OF FACT

20. The Applicant will use a 2.50 CFS Berkeley Pump H806, model # B3JRMBM. The impeller is 13.5 inches with 4-inch inlet and 3-inch outlet. The mainline pipe is 10 inches in diameter and after approximately ¼ mile, it is reduced to 8 inches for approximately ½ mile. The handline runs approximately ¼ mile each. Water will be applied to the field using a total of 2 hand lines which will be operated simultaneously. The Department finds that the pump and handlines are all capable of delivering the requested volume at the requested flow rate.

POSSESSORY INTEREST

FINDINGS OF FACT

21. Applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

22. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an

existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

23. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

24. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

25. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

26. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

27. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31, 43, 198 P.3d 219, ¶¶ 22, 31, 43 (citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

28. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. A.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. A.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. A.R.M. 36.12.1901 and 1903.

29. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972

Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

30. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

31. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

32. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. A. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence

of historic beneficial use. In this case Applicant has elected to proceed under A. R.M. 36.12.1902. (FOF No. 9).

33. If an Applicant seeks more than the historic consumptive use as calculated by A.R.M. 36.12.1902 (16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

34. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Claim 40F 158372-00 of 313.7 AF diverted volume and 2.50 CFS flow rate with a consumptive use of 91.9 AF. (FOF Nos. 10 – 13)

35. Based upon the Applicant’s comparative analysis of historic water use, and water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 10—13)

BENEFICIAL USE

36. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-

311, MCA. A.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

37. Applicant proposes to use water for sprinkler handline irrigation which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and 2.50 CFS flow rate up to 51.6 AF of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA (FOF Nos. 18—19)

ADEQUATE MEANS OF DIVERSION

38. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of

diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

39. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF No. 20)

POSSESSORY INTEREST

40. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also A.R.M. 36.12.1802

41. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 21)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 40F 30155836 should be GRANTED subject to the following:

The Applicant is authorized to retire the headgate point of diversion location at NWNENW Section 10, T34N, R12W Glacier County. The Applicant's new point of diversion on Statement of Claim 40F 158372-00 will be a 2.50 CFS pump connected to a 120.0-acre handline. The Claim's 120-acre place of use will not change. The new point of diversion will be located at SWNWNW Section 34, T35N, R12W Glacier County. The Applicant will change their irrigation method from flood to sprinkler handline irrigation along with their diversion means from a headgate to a pump. The proposed pump will operate at 2.50 CFS with a total diverted volume not to exceed 91.9 AF.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 28th day of March 2023.

/Original signed by Matt Miles/

Matt Miles, Manager

Havre Regional Office

Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 28th day of March 2023, by first class United States mail.

DAN L. GEER
84 MCDONALD ROAD
BROWNING, MT 59417

Havre Regional Office, (406) 265-5516